FILED
MAR 10 1947
CHARLES ELMORE CROPLEY
CLERK

No. 983

In the Supreme Court of the United States

OCTOBER TERM, 1946

SAMUEL ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and regulations involved	2
Statement	4
Argument	7
Conclusion	11

CITATIONS

Cases:	
Allis v. *United States*, 155 U. S. 117	10
General Pictures Co. v. *Electric Co.*, 304 U. S. 175	7
Holmgren v. *United States*, 217 U. S. 509	10
Husten v. *United States*, 95 F. 2d 168	8
Janow v. *United States*, 141 F. 2d 1017	8
Johnson v. *United States*, 318 U. S. 189	10
Levi v. *United States*, 71 F. 2d 353	8
Rosen v. *United States*, 271 Fed. 651	8
United States v. *Johnston*, 268 U. S. 220	7
United States v. *Manton*, 107 F. 2d 834, certiorari denied, 309 U. S. 664	10
Statute and regulations:	
Act of June 28, 1940, c. 440, 54 Stat. 676, as amended by the Act of May 31, 1941, c. 157, 55 Stat. 236, and by Title III of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 177, 50 U. S. C. App., Supp. V, 633 (50 U. S. C. App., Supp. V, 1152):	
Sec. 2 (a) (2)	2
Sec. 2 (a) (5)	2
Sec. 2 (a) (8)	3
Sections 2.5 and 2.6 of General Ration Order No. 8, as amended (8 F. R. 3783; 8 F. R. 9626; 9 F. R. 1325; 9 F. R. 2746)	3

734084—47

QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction of wilfully and unlawfully possessing ration stamps.

2. Whether the trial judge's charge resulted in reversible error.

STATUTE AND REGULATIONS INVOLVED

The Act of June 28, 1940, c. 440, 54 Stat. 676, as amended by the Act of May 31, 1941, c. 157, 55 Stat. 236, and by Title III of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 177, 50 U. S. C. App., Supp. V, 633 (50 U. S. C. App., Supp. V, 1152), provides in pertinent part:

> SEC. 2 (a) (2). * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> SEC. 2 (a) (5). Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether

heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

SEC. 2 (a) (8). The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Sections 2.5 and 2.6 of General Ration Order No. 8, as amended (8 F. R. 3783; 8 F. R. 9626; 9 F. R. 1325; 9 F. R. 2746), provide:

SECTION 2.5 *Acquisition, use, transfer or possession of counterfeited or forged ration document.* (a) No person shall acquire, use, permit the use of, transfer, possess or control any counterfeited or forged ration document under circumstances which would be in violation of section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeited or forged.

SECTION 2.6 *Acquisition, use, transfer or possession of ration document.* No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance

with a ration order or except as otherwise provided by a ration order. No person shall use or transfer a token or other ration document except in a way and for a purpose permitted by a ration order.

STATEMENT

An information in one count was filed against petitioner in the District Court for the Southern District of New York, charging him with a violation of Section 2 (a) of the Act of June 28, 1940, as amended (*supra*). The information alleged that on June 29, 1945, petitioner wilfully and knowingly had in his possession and control 106,128 counterfeit red ration stamps, purporting to represent 1,061,280 ration points, under circumstances which would have been in violation of Section 2.6 of General Ration Order No. 8 if the stamps had been genuine, "that is to say, the * * * defendant did not know the * * * ration documents to be counterfeit, and was * * * not the person or the agent of the person to whom said ration documents, if genuine, were issued or would have been issued or by whom they were acquired or would have been acquired, in accordance with Revised Ration Order No. 16 and General Ration Order No. 8 duly issued by the Price Administrator." (R. 2–3.) After a jury trial, petitioner was found guilty (R. 52), and he was sentenced to imprisonment for one year and to pay a fine

of $2,500 (R. 55).[1] Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was first reversed on October 31, 1946, in a majority opinion written by Judge Frank in which Judge Learned Hand joined (R. 65–70); Judge Swan dissented (R. 70). Thereafter, the court on its own motion directed reargument (R. 72), and on January 10, 1947, affirmed the judgment in a majority opinion by Judge Frank in which Judge Swan joined (R. 72–73); Judge Learned Hand dissented (R. 73–74).

The evidence adduced at petitioner's trial may be summarized as follows:

On June 29, 1945, two New York City detectives, Eugene Epstein and John F. Dalton, went to petitioner's room in the Hotel Duane in New York City, occupied by himself and his wife. Epstein identified himself to petitioner and informed him that he and Dalton had come to investigate a matter "which concerned the State of New York."[2] The officers entered the room, and Epstein searched it. (R. 13, 18, 28.) He found in a closet a brief case bearing petitioner's initials. He opened the brief case and found in it a number of packages wrapped in paper. The

[1] On January 8, 1946, petitioner elected to begin service of his sentence (R. 61). The Bureau of Prisons advises that petitioner was admitted to bail on January 26, 1946, pending determination of his appeal.

[2] Epstein testified that the occasion of their visit had no connection with ration stamps (see R. 19, 22, 25).

packages were not sealed, but were tie[d with] string. In one of these packages, Epste[in dis]covered a quantity of red ration stamps. [(R. 18–]19, 23, 28–29, 31.)[1] Epstein testified t[hat he] asked petitioner "where he got these st[amps" and petitioner replied that "they were lef[t there] by a Mr. Frank"; that petitioner said he [did not] know "where Mr. Frank was or where h[e could] be located"; and that petitioner "never [claimed] to own these things, and never claimed t[o know] what was in that package" (R. 22–23). [Dalton] testified that Epstein "asked [petitioner] [where] he had gotten the stamps, and [petitione[r] said] he got them from a man by the name [of Mr.] Frank. * * * he did not know h[is last] name"; that petitioner was not asked whe[ther the] "articles contained in that brown pack[age be]longed to him," but was asked, "Where [did you] get these stamps?"; that petitioner did [not say] that Frank "left that package with him," [but said,]

[1] The stamps in the package were thus describ[ed in the] brief of the United States Attorney filed in the ci[rcuit court] of appeals (p. 3): The stamps were in sheets, [similar to] large sheets of perforated postage stamps. The s[heets were] 8½ by 11 inches and each contained 144 counter[feit ration] stamps (Govt. Ex. 3, R. 20, 25). There were 737 s[uch sheets] in the brief case, making a total of 106,128 stamps. If the stamps had been genuine they would have appear[ed in War] Ration Book No. 4 (Govt. Ex. 4, R. 33) in a differ[ent layout] (R. 33). It was stipulated that the original exh[ibits "may] be submitted to the Circuit Court of Appeals on the argument of this case and referred to in the briefs of either parties with the same force and effect as if same had been set forth at length in the record on appeal * * *" (R. 62).

"he got them"; that Epstein "tore the paper and there were the stamps. * * * And then he asked [petitioner] 'Where did you get these stamps?' and he said 'I got them from a man by the name of Mr. Frank' " (R. 29–31). Dalton also testified that petitioner did not claim ownership of the stamps and did not "say anything which would indicate that he knew what was in that package before or after * * * Epstein opened it" (R. 31).

An O. P. A. "counterfeit specialist" testified that the ration stamps which the officers found in the package were counterfeit (R. 32–34).

Petitioner's motion for a directed verdict of acquittal at the close of the Government's case was denied (R. 35–44); he did not take the stand and offered no evidence in his own behalf (see R. 45).

ARGUMENT

I

Petitioner contends (Pet. 6–7, 14–18) that there was not sufficient evidence to support submission to the jury of the issue whether he knowingly possessed the ration stamps. This Court has said it will not grant certiorari to review evidence. *United States* v. *Johnston,* 268 U. S. 220, 227; see also *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178. There is nothing in this case, we submit, to warrant a departure from this practice.

As we see the case, the evidential picture was simply this: A package of not inconsiderable size, containing 106,128 counterfeit red ration stamps, representing 1,061,280 ration points, was found in petitioner's personal brief case in a closet in a hotel room occupied by petitioner and his wife, by New York City detectives investigating a state matter. The package in which these counterfeit stamps were concealed was not sealed but was in a paper parcel tied with string. If petitioner had remained silent when confronted with this mass of contraband documents, there can be no doubt that the jury would have been entitled to infer that he knew what was in the package.[4] It may be open to question whether, in the face of such convincing, though circumstantial, evidence of guilty knowledge, a defendant, by explanation of his possession, may ever bar appraisal by the jury of the explanation.[5] But certainly, to have that effect, the explanation must be at least a persuasive one when gauged by the circumstances which must be overcome. As testified to by the officers, petitioner's explanation, in the light most favorable to him, was simply this: the package containing the enormous quantity of

[4] Compare the inference of knowledge of theft arising from the possession of recent stolen goods. *Janow* v. *United States*, 141 F. 2d 1017 (C. C. A. 5); *Husten* v. *United States*, 95 F. 2d 168, 170 (C. C. A. 8); *Levi* v. *United States*, 71 F. 2d 353, 354 (C. C. A. 5); *Rosen* v. *United States*, 271 Fed. 651, 655.

[5] Compare *Levi* v. *United States*, *supra*; *Rosen* v. *United States*, *supra*.

counterfeit ration stamps found in his brief case was left with him or he got it from a man named "Frank," but he was not aware of the contents of the package. However, he professed not even to know the man's last name or his whereabouts. Indeed, the disclosure of the stamps did not, as Judge Swan points out (R. 70), cause him surprise so far as appears from the officers' testimony. It would seem evident, as Judge Frank puts it (R. 72), that the explanation given to the officers was "of a kind which the jury may reasonably have believed to be so fishy as to show, by the mere telling of it, a guilty knowledge of what was inside the paper parcel found in defendant's brief case."

Apropos the considerations referred to in Judge Hand's dissenting opinion (R. 73–74), we think it need only be said that the substantiality of the Government's case did not depend here upon any inference arising from petitioner's failure to take the stand; it was substantial before. And just because it is not entirely inconceivable that petitioner's story may have been true, that is no reason for depriving the jury of its appropriate function of determining whether it was true. The duty of the trial, as well as of the appellate court, was, at most, simply to ascertain whether it would be unreasonable, under the circumstances, for the jury to conclude that petitioner's disclaimer of knowledge of the package's contents was unbelievable. Those courts, we believe, could not have properly so ruled.

2. Petitioner also contends (Pet. 7, 19–25) that the trial judge committed reversible error in failing to instruct the jury as to the circumstances under which possession of ration stamps was illegal. Petitioner made no complaint on this score at the trial (see R. 50–52), and his objection, raised for the first time on appeal, clearly presents no ground for reversal. *Johnson* v. *United States*, 318 U. S. 189, 201; *Holmgren* v. *United States*, 217 U. S. 509, 523–524; *Allis* v. *United States*, 155 U. S. 117, 122; *United States* v. *Manton*, 107 F. 2d 834, 846 (C. C. A. 2), certiorari denied, 309 U. S. 664. But, in any event, as the majority below stated, there was "nothing improper in the judge's charge" (R. 73). Petitioner's argument is that since the prosecutor "conceded" at the trial that "there are perhaps fifty or a hundred different ways in which a man could be possessed legally of these stamps, according to the ration order" (R. 43), it was incumbent upon the judge to instruct the jury as to the precise circumstances under which one could legally possess such stamps; and that the judge instead of doing so merely told the jury that they might "draw [their] own conclusion as to whether or not he [petitioner] got them legally" (R. 49). The judge, however, told the jury that while the genuineness of the stamps was not directly involved in the case, they could consider "whether he could obtain from a legitimate source, the United States Government, counterfeit stamps.

If he could not get them from the United States Government because they were counterfeit, you can consider whether that indicates to you that he got them from some illegal source" (R. 49). The fact that the stamps were counterfeit could certainly be considered by the jury in appraising the lawfulness of petitioner's possession. It is, of course, true that counterfeit ration stamps could inadvertently be received. But it is manifest that the jury was entitled to conclude that no such situation existed in this case. See pp. 7–9, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
W. MARVIN SMITH,
Special Assistant to the Attorney General.
ROBERT S. ERDAHL,
LEON ULMAN,
Attorneys.

MARCH 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947